

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

NORTHEAST MONTANA HEALTH SERVICES, INC.,
d/b/a/ POPLAR COMMUNITY HOSPITAL AND NURSING HOME
AND RIVERSIDE FAMILY CLINIC,

Employer

Case No. 27-RC-8060

and

AFSCME MONTANA STATE COUNCIL #9, AFL-CIO,

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as "the Act," a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as "the Board."

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Undersigned.

Upon the entire record in this proceeding, the Undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Northeast Montana Health Services, Inc., d/b/a Poplar Community Hospital and Nursing Home and Riverside Family Clinic, herein called "the Employer," is a Montana nonprofit corporation engaged in the operation of health-care facilities, including a hospital, nursing home, and clinic in Poplar, Montana, and a hospital, nursing home, and clinic in Wolf Point, Montana. During the past 12-month period the Employer received gross revenues in excess of

\$250,000. During that same 12-month period the Employer purchased and received goods and services at each of its facilities valued in excess of \$5,000 directly from suppliers located outside the State of Montana. I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Further, I find that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that AFSCME Montana State Council #9, AFL-CIO, herein called "the Petitioner," is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner petitions for a unit of all full-time and regular part-time registered nurses, licensed practical nurses, and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act. The Board has held that registered nurses are "professional employees" within the meaning of Section 2(12) of the Act, and that licensed practical nurses are "technical employees." See Centralia Convalescent Ctr., 295 NLRB 42 (1989); Washington Nursing Home, 321 NLRB 366, 369 (1996). Certified nursing assistants are not professional employees. In accordance with Section 9(b) of the Act, which prohibits the Board from including professional employees in a unit with nonprofessional employees unless a majority of the professionals votes for inclusion in such a unit, I make the following unit determinations:

- a. If a majority of the full-time and regular part-time registered nurses employed by the Employer at its hospital, nursing home, and clinic in

Poplar, Montana vote for inclusion in the same unit with the full-time and regular part-time licensed practical nurses and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, then the following employees will constitute a unit appropriate for the purposes of collective bargaining: all full-time and regular part-time registered nurses, licensed practical nurses, and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic located in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act.

- b. If a majority of the full-time and regular part-time registered nurses employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana do not vote for inclusion in the same unit with the full-time and regular part-time licensed practical nurses and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, then the following two groups of employees will constitute separate units appropriate for collective bargaining:

Group A: all full-time and regular part-time registered nurses employed by the Employer at its hospital, nursing home, and clinic located in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act;

Group B: all full-time and regular part-time licensed practical nurses and

certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic located in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c)(1) and Section 2(6) and (7) of the Act.

STATEMENT OF FACTS

Before July 1, 1996, two separate nonprofit corporations operated health-care facilities in Poplar and Wolf Point, Montana. Poplar Community Hospital Association, a Montana nonprofit corporation, operated a hospital and nursing home in Poplar. The Trinity Hospital Association, another Montana nonprofit corporation, operated a hospital and nursing home in Wolf Point. Effective July 1, 1996, those corporations merged for financial reasons into a single nonprofit corporation, Northeast Montana Health Services, Inc.

In addition to the hospitals and nursing homes in Poplar and Wolf Point, Northeast Montana Health Services, Inc. owns and operates two health-care clinics, one in Poplar and the other in Wolf Point. The Poplar clinic, known as the Riverside Family Clinic, is wholly owned and managed by Northeast Montana Health Services, Inc., although it is separately incorporated. Like the Poplar clinic, the Wolf Point clinic also is wholly owned and managed by Northeast Montana Health Services, Inc. and is separately incorporated. Regulations of the U.S. Health Care and Financing Administration require that rural health care clinics be separately incorporated. In its

brief, the Employer acknowledges that Northeast Montana Health Services, Inc. wholly controls its subsidiary clinic corporations.

In Poplar, the Employer operates a combined hospital/nursing home and a clinic. The hospital/nursing home, which is identified as the Poplar Community Hospital and Nursing Home, occupy the same building. The hospital takes up two wings of the west end of the building and the emergency room. The nursing home takes up two wings of the east end of the building. There is a common nursing station between the hospital and the nursing home. The Poplar hospital is a "critical access hospital" within the meaning of federal health-care regulations administered by the Health Care Financing Administration.¹ The hospital is geared to treatment of outpatients. Under the regulations that govern critical access hospitals, the Employer can keep its patients only up to 96 hours. There are 15 beds in the hospital. The hospital usually has only two or three patients per day. If there are no patients in the hospital, the hospital may operate without physicians present. In that situation, an RN must be on call no more than 20 minutes away. In practice, the Employer ensures that an RN is present at the facility when a physician is not present. The nursing home has 22 beds. The Poplar clinic is located across the street from the hospital/nursing home.

In Wolf Point, which is approximately 20 miles away from Poplar, the Employer also operates a hospital, clinic, and nursing home. The hospital, known as Trinity Hospital, is a 20-bed facility. The parties stipulated, and I find, that Trinity Hospital is an

¹ The parties stipulated that the Poplar hospital is not an "acute care hospital" within the meaning of Section 103.30 of the Board's Rules and Regulations, which defines appropriate bargaining units for such facilities. Accordingly, the provisions of Section 103.30 of the Board's Rules and Regulations are inapplicable here.

"acute care hospital" within the meaning of Section 103.30 of the Board's Rules and Regulations. The utilization rate at the Wolf Point hospital is higher than at Poplar. There is more inpatient treatment and surgery at Wolf Point than at Poplar. The clinic, known as Listerud Rural Health Care Clinic, is attached to the Wolf Point hospital. The nursing home, Faith Lutheran Nursing Home, is a 60-bed free-standing nursing home. It is located approximately three blocks away from the Wolf Point hospital/clinic.

The Employer's chief executive officer is Administrator Margaret Norgaard. Norgaard is responsible for the overall operation of the Poplar and Wolf Point facilities. She reports to a governing board of directors. She splits her time between Poplar and Wolf Point and maintains offices in both locations. There are several departments, including nursing, maintenance, housekeeping, laundry, dietary, and administration. A Director of Human Resources, Annie Block, coordinates personnel policies for the Employer. She maintains an office in Wolf Point. When the Employer needs to hire more staff, Block takes care of advertising, accepts resumes, and coordinates the interview and hiring process. There is a Chief Financial Officer, Maxine Vondeson, who works out of Wolf Point but handles finances for both Wolf Point and Poplar. Other personnel—including the director of radiology, the housekeeping supervisor, the dietary supervisor, the medical records director, the maintenance supervisor, and the business office manager—have offices both in Poplar and Wolf Point.

To avoid competition between the Poplar and Wolf Point hospitals and nursing homes, accounting and financial statements for those facilities are consolidated. All of the revenue generated at those locations goes into one general checking account. Billing is done through the Wolf Point location. The clinics' finances are handled

separately. The Poplar and Wolf Point locations share some equipment, such as IV pumps, cribs, beds, and heart monitors.

The management of the nursing department staff consists of a Director of Nursing ("DON") and Assistant Director of Nursing ("ADON") at Poplar and a DON and ADON at Wolf Point. The DONs and ADONs report to Administrator Norgaard. The DON and ADON in Poplar are Pam Turnbaugh and Val Smith, respectively. The DON in Wolf Point is Joanne Hible, and Elaine Long is the ADON. For nursing department staff, the DONs and ADONs handle the interviewing, hiring, firing, evaluating, disciplining, and oversight of scheduling for their respective facilities. The DONs and ADONs consult with each other at times regarding hiring decisions. The parties stipulated that the DONs and ADONs are statutory supervisors who are excluded from the bargaining unit, and the record supports this stipulation.

The Employer's nursing department staff includes certified nursing assistants ("CNAs"). The CNAs' primary duty is to provide residents with routine daily nursing care and services. Specifically, the CNAs perform patient care tasks such as assisting patients/residents with hygiene needs, dressing/undressing, serving meals, making beds, escorting residents around the premises, putting residents to bed, getting water for them, brushing their teeth and dentures, assisting residents in bathing and showering, giving backrubs, and handling other personal care matters. CNAs must be certified.

The Employer also employs licensed practical nurses ("LPNs"). Their main function is to provide direct skilled nursing care to patients. They also oversee the

CNAs in the performance of their patient care duties. To qualify for the position, the LPN must be licensed with the State of Montana.

The nursing department also includes registered nurses ("RNs"). The RNs oversee the day-to-day nursing activities of the facility. To qualify for an RN position with the Employer, an applicant must be licensed as an RN in the State of Montana.

In Poplar, there are approximately 11 RNs, 4 LPNs, and 27 CNAs at the hospital/nursing home. Nursing staff go back and forth between the hospital and the nursing home wings. There are two members of the clinic's nursing staff, consisting of part-time RNs. One RN (Lauri Handy) also works at the hospital/nursing home. Personnel at the clinic use facilities, such as dining and break rooms, in the hospital/nursing home building.

The number of RNs and LPNs in Wolf Point is not clear from the record. There are approximately four members of the nursing staff at the Wolf Point clinic, consisting of one RN, one LPN, and two CNAs.

When the DONs hire nursing staff, they hire them to work primarily at either Poplar or Wolf Point. The Employer maintains separate lists of employees who were initially hired to work at Poplar and Wolf Point, but at this time those lists do not accurately reflect the primary location where all employees work. Each employee's personnel file is kept at the facility where the employee primarily works. New hires may attend orientation sessions at either Poplar or Wolf Point. The orientation sessions are identical at those locations. Employees can choose where to attend orientation, based on their own assessments about which location would be more convenient for them. The Employer has separate payrolls for the employees at Poplar and Wolf Point,

primarily for the convenience of the employees. Director of Human Resources Block handles the time cards at Wolf Point. An administrative assistant at Poplar, Sheila Hook, takes care of the time cards at Poplar. Block reviews Hook's work on the time cards. All payroll data is sent out for processing. The payroll checks for Wolf Point and Poplar are drawn on different bank accounts.

Employees are told at the time of hire that they may be asked to work at the Poplar hospital/nursing home or the Wolf Point hospital or nursing home. They sign a statement acknowledging that they are aware of that possibility. In practice, the Employer has sought volunteers from Wolf Point to help out in short staff situations in Poplar. To deal with such staff shortages, nursing department personnel in Poplar contact nursing staff who regularly work in Wolf Point to ask if they have time off from their Wolf Point work schedules to allow them to work shifts in Poplar. Scheduling for Poplar and Wolf Point is not consolidated. The employees at Wolf Point may volunteer if they want to fill in at Poplar. They are not ordered to fill in. As an incentive to get employees to fill in at Poplar, the Employer pays overtime to those who volunteer. There are approximately five or six nursing department employees from Wolf Point who volunteer to work at Poplar from time to time when they are able to do so, but not in every pay period. The evidence that the Employer adduced at the hearing does not disclose precisely how frequently those Wolf Point personnel work at Poplar. The Employer did not offer any personnel records to demonstrate the degree of employee interchange between Wolf Point and Poplar.

The Employer applies several common personnel policies to its employees regardless of where they work. For example, there is one wage scale for the Poplar

and Wolf Point facilities. Also, employees at Poplar and Wolf Point are covered by the same health insurance, life insurance, workmen's compensation, and 401(k) plans, and time off, vacation, and sick leave policies. Insurance lists do not identify employees' primary work location. Badges and uniforms are the same.

Members of the nursing staff at Poplar and Wolf Point serve on joint committees. Employees at Poplar and Wolf Point receive training in the same subject areas. An In-Service Coordinator coordinates that training. Poplar and Wolf Point employees sometimes attend training together.

The work of the RNs, LPNs, and CNAs in the Poplar hospital/nursing home is divided among two shifts--the day shift and night shift. On the day shift at the Poplar hospital/nursing home, there generally are one RN and three-and-one-half CNAs (one CNA in the hospital and two-and-one-half CNAs in the nursing home). On the night shift at Poplar, there usually are one RN, two LPNs, and 2 CNAs (one CNA in the hospital and two CNAs in the nursing home). Staffing levels by shift at the Wolf Point facility is not disclosed in the record.

The Employer has one RN on each shift serve as a "charge nurse." The charge nurse function is not permanently assigned to particular RNs. Rather, the charge nurse function rotates among the RNs. Thus, each of the RNs periodically serves as charge nurse. DON Turnbaugh testified that federal regulations permit the Employer to use LPNs as charge nurses when there are no patients in the hospital. The Employer, however, does not have LPNs serve as charge nurses in Poplar.

The RN charge nurses assign patient care responsibilities to the LPNs and CNAs. Under the statutes and regulations pertaining to critical access hospitals,

licensed physicians need not be present in the hospital when no inpatients are present. Thus, nursing staff may have to take on significant responsibilities relating to patient care. As part of that responsibility, RNs may assign patient care responsibilities to other nursing personnel.

The charge nurses may instruct the LPNs regarding the administration of medication or give directions about patient assessments or evaluations. Charge nurses teach employees, especially newer employees, what they need to know to care for the patients.

When workloads require, charge nurses may temporarily move available nursing staff between the hospital and nursing home to meet patient care needs. The RN charge nurse also has authority to call in staff to ensure adequate coverage. In selecting someone to come in, the charge nurse consults the schedule to see who is available to fill in. The charge nurse directs the ward clerk to make calls and find replacements. The DON has authorized them to call in an employee even if that means that the called-in employee will get overtime. The charge nurse does not have the authority to order employees to come in.

Charge nurses have the authority to send home staff members who are sick, intoxicated, under the influence of drugs, or who have carried weapons into the facility, pending notification to and investigation by higher authority such as the DON. The Employer has policies on such issues. The charge nurse is expected to follow policy and is not permitted to go outside the policy in sending an employee home.

Charges nurses have the authority to notify the DON, either verbally or in writing, about problems with staff that may require discipline. The DON retains the authority to

take disciplinary action. The DON may consult with the RN in deciding disciplinary issues. Occasionally, charge nurses sit in on counseling sessions.

Charge nurses give input on evaluations. Other nursing staff, including other RNs, LPNs, and CNAs, also may participate in the staff evaluation process. As part of the evaluation process, the DONs may ask for RNs', LPNs', and CNAs' input. The DONs have the final say regarding the content of the actual evaluations; they can reject the comments from others.

The DON may ask for the charge nurses' input regarding decisions about whom to hire. For example, if a former employee applies for rehire, the DON may ask the charge nurse about that employee's ability. After taking an applicant on a tour of the facility as part of the hiring process, a charge nurse also may report her opinion about the applicant to the DON.

The Employer expects charge nurses to settle some disputes among nursing staff as such issues arise on the floor. To settle such matters, the RNs mediate between the involved personnel. Charge nurses are not involved in formal grievance procedures.

In the event of a disaster, such as a tornado, the RN charge nurse is responsible for coordinating the facility's response to the disaster. She initiates a disaster call tree that the Employer has prepared. The Employer has promulgated a detailed disaster protocol that sets out staff members' responsibilities. The disaster procedure has not been invoked frequently. The last time that the call tree was initiated for a serious incident was approximately one year ago.

ANALYSIS AND CONCLUSIONS

The Employer contends that a unit limited only to the Poplar hospital/nursing home and clinic is inappropriate and that the only appropriate unit would also include the Wolf Point hospital, nursing home, and clinic. The Employer also contends that its RNs are statutory supervisors whom the Board cannot include in a bargaining unit. Finally, the Petitioner seeks to exclude several individuals on the grounds that they are predominantly supervisory and do not share a community of interests with the unit employees because they do not perform any substantial direct patient care.

1. The Geographic Scope of the Unit

The Petitioner seeks to represent a unit restricted solely to the RNs, LPNs, and CNAs employed by the Employer at its hospital/nursing home and clinic in Poplar. The Poplar hospital and nursing home are located in the same building, and the Employer's clinic is located just across the street. Thus, it is apparent that the Poplar hospital, nursing home, and clinic are physically contiguous and share essentially the same situs. Moreover, the record evidence shows that the nursing staff in the hospital/nursing home building go back and forth between the hospital and nursing home wings. At least one of the two clinic nurses also works in the hospital/nursing home. Clinic personnel also use facilities located in the hospital/nursing home building. Those factors demonstrate that the hospital/nursing home and the clinic constitute a single facility.

The evidence establishes that the Employer's Poplar hospital/nursing home, and clinic are geographically separate from the Employer's Wolf Point hospital, nursing home, and clinic. The Poplar facilities are approximately 20 miles away from the Wolf Point facilities.

In light of those considerations, it is clear that the Petitioner is seeking to represent a single-facility unit that is geographically separate from the Employer's other facilities. In determining the appropriateness of bargaining units, the Board long has held that a single-facility unit geographically separated from other facilities operated by the same employer is presumptively appropriate for the purpose of collective bargaining. See Manor Healthcare Corp., 285 NLRB 224, 225 (1987). The Board applies such a single-facility presumption in the health-care industry. See, e.g., Visiting Nurses Ass'n of Central Illinois, 324 NLRB 55, 55 (1997); Manor Healthcare Corp., 285 NLRB 224 (1987). In accordance with that precedent, I find that the Petitioner's proposed unit is a presumptively appropriate one. The Employer apparently acknowledges in its brief that the Poplar hospital, nursing home, and clinic are a single facility to which the single-facility presumption applies.

As the Employer contends, however, the presumptive appropriateness of such a single-facility unit can be rebutted. Thus, an employer can rebut the single-facility presumption by demonstrating functional integration so substantial as to negate the separate identity of the single-facility unit. See Heritage Park Health Care Ctr., 324 NLRB 447, 451 (1997), enforced, 159 F.3d 1346 (2d Cir. 1998) (table). In determining whether the presumption has been rebutted, the Board considers whether there is central control over daily operations and labor relations, including the extent of local autonomy; similarity of employees skills, functions, and working conditions; degree of employee interchange; common supervision; distance between locations; and bargaining history. Id. Moreover, if an employer can show that there is a reasonable basis for concluding that a single-facility unit would lead to an increased risk of work

disruption or other relevant adverse consequences for patient care, the single-facility unit will be deemed inappropriate. See Manor Healthcare Corp., 285 NLRB at 226.

Based on consideration of the pertinent factors, I find that the record does not support the Employer's contention that the degree of functional integration between the Poplar and Wolf Point locations is so substantial as to negate the appropriateness of a single-facility unit. Thus, the record does not reflect that there is central control over daily operations and labor relations. Rather, the record reflects that local facility supervisors retain a significant degree of control over day-to-day operations and labor relations, albeit within the framework established by company policy. Thus, for example, the DONs have authority to interview, hire, schedule, discipline, evaluate, and take care of day-to-day supervision of their respective nursing staffs. Patient care appears to proceed independently at each location. Moreover, the evidence does not demonstrate that there is a substantial level of employee interchange between Poplar and Wolf Point. As noted above, the Employer did not adduce specific evidence regarding the frequency with which Wolf Point nursing staff fill in at Poplar, nor did it submit personnel records on that issue. See, e.g., Children's Hosp., 312 NLRB 920, 929 (1993) (single facility un rebutted where employer alleged that there was substantial interchange but failed to give specific information or offer corroborating records), enforced, 87 F.3d 304 (9th Cir. 1996). Moreover, there is not common supervision over the nursing staffs at Poplar and Wolf Point; supervision is done separately through the respective DONs and ADONs at those facilities. Also, the Poplar and Wolf Point locations are not so close to each other as to compel the conclusion that they have no separate identities. The 20-mile separation between the two locations tends to limit the

employees' ability to interact frequently. Additionally, there is no bargaining history in a broader unit.

Nor has the Employer demonstrated that a single-facility unit would lead to an increased risk of work disruption or other relevant adverse consequences for patient care. The Employer suggests that union representation of only the Poplar nursing staff would make it impossible for the Employer to use Wolf Point staff at Poplar, thereby interfering with the Employer's ability to provide quality patient care at Poplar. That result, however, does not necessarily follow. As discussed above, the Employer has not demonstrated that a substantial number of nursing staff from Wolf Point perform work in Poplar. Additionally, in the event that the Petitioner were to come to represent the nursing staff in Poplar, the Employer has not demonstrated that it would be precluded from using Wolf Point personnel at Poplar to help cover situations where the unit members in Poplar could not handle the available work. The Employer would remain free to work out with the Petitioner, in the collective-bargaining process, terms of an arrangement to use Wolf Point personnel to perform unit work at Poplar in situations where the Poplar facility was short-staffed. In the meantime, the Employer legally would be able to continue its existing practice of covering shortages at Poplar with Wolf Point personnel because, were the unit employees to select the Petitioner as their bargaining representative, the Act would obligate the Employer to maintain the terms and conditions of employment in existence at that time. While the Employer undoubtedly would find it to be more expeditious simply to decide unilaterally how to use Wolf Point personnel at Poplar, the Board attaches little weight in a unit determination proceeding to an employer's loss of some efficiency in administering labor relations. See Manor

Healthcare Corp., 285 NLRB 224, 228 (1987). In any event, any burden that the Employer may experience in having to bargain over that issue with the Petitioner as the representative of the Poplar nursing employees would exist were the Petitioner to come to represent the employees in the Employer's proposed unit encompassing both Poplar and Wolf Point.

In contending that the single-facility unit is inappropriate, the Employer relies on several pieces of evidence, including evidence of central administration of the Poplar and Wolf Point facilities, common wages and benefits, some employee interchange, and similar skills. There is no doubt that some record evidence weighs in favor of a unit consisting of employees at Poplar and Wolf Point. However, in light of the factors identified above that militate against a multi-location unit, I conclude that the evidence upon which the Employer relies does not compel the conclusion that the petitioned-for single-facility unit is inappropriate. See, e.g., Visiting Nurses Ass'n of Central Illinois, 324 NLRB 55, 55-56 (1997) (in light of evidence favoring single-location unit, some evidence favoring a multi-location unit insufficient to destroy the separate identity of employer's facilities); O'Brien Mem'l, 308 NLRB 553, 553-554 (1992) (fact that several of employer's facilities are operated under administrative centralization with uniform policies for all employees insufficient to refute the presumptive appropriateness of a single-facility unit).

2. The Status of the RNs

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding supervisors from the Act's protections. Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See KGW-TV, 329 NLRB No. 39, slip op. at 4 (1999). The other requirements, however, are conjunctive; thus, an individual is not a supervisor unless the individual exercises that power with the use of independent judgment and holds the authority in the interest of the employer. Id.

In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees--such as "straw bosses, leadmen, set-up men, and other minor supervisory employees"--who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Consistent with that congressional intent, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See KGW-TV, 329 NLRB No. 39, slip op. at 4 (1999). Accordingly, the burden of proving supervisory status rests upon the party who claims that such status exists. See Bennett Indust., 313 NLRB 1363, 1363 (1994).

In NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994) ("HCR"), the Supreme Court rejected the Board's interpretation of the Section 2(11) term "in the interest of the employer" as not including the actions of health care professionals when

directing and assigning other employees in furtherance of patient care. The Court acknowledged, however, that other phrases in Section 2(11), including the phrase "independent judgment," are "ambiguous, so that the Board needs to be given ample room to apply them to different categories of employees." Id. at 579. Additionally, the Court expressly disclaimed any intent to disapprove prior Board and court decisions finding that workers were not supervisors because their direction and assignment of other employees did not involve the use of independent judgment. Id. at 583.

After the Supreme Court's decision in HCR, the Board revisited the issue of the proper construction of Section 2(11) in the context of the status of health care professionals. In Providence Hosp., 320 NLRB 717, 729 (1996) ("Providence"), reaffirmed in Providence Alaska Med. Ctr., 321 NLRB No. 100 (1996), enforced, Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997), the Board stated that "the analysis of most cases raising supervisory issues will be made pursuant to the Board's traditional approach of analyzing whether the direction is done with independent judgment." Additionally, in Ten Broeck Commons, 320 NLRB 806, 810 (1996), the Board made clear that it would "treat charge nurses the same as all other employee classifications" and would "apply to them the same test" that it applied to all other employees.

In contending that the RNs are supervisors, the Employer relies on the authority and responsibility that the RNs' possess, due to the Poplar hospital's status as a critical access hospital, to assign and direct other nursing staff with respect to patient care duties.² Contrary to the Employer's contention, the RNs' assignment and direction

² Another employer, Roosevelt Memorial Medical Center, advanced a similar argument to the Board in Case No. 27-RC-8002 in a request for review of an Acting Regional

responsibilities at the Poplar hospital do not qualify them as statutory supervisors within the meaning of Section 2(11) of the Act. The authority of RNs to assign and direct other workers in the performance of patient care tasks does not create supervisory status.

Under the Board's traditional approach of analyzing "independent judgment," the Board has "distinguished supervisors who share management's power or have some relationship or identification with management from skilled non-supervisory employees whose direction of other employees reflects their superior training, experience, or skills."

Providence, 320 NLRB 717, 729 (1996). Accord Ten Broeck Commons, 320 NLRB 806, 811 and n.10 (1996). As the Board stated in Providence, 320 NLRB at 729:

Section 2(11) supervisory authority does not include the authority of an employee to direct another [employee] to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

In particular, since "making decisions requiring expert judgment is the quintessence of professionalism," the "mere communication of those decisions and coordination of their implementation do not make the professional a supervisor." Id. Here, the RNs' authority to assign and direct other staff stems from their greater experience, skills, and training, and is incidental to the performance of their own patient care responsibilities.

Accordingly, I find that the RNs authority to assign and direct other staff does not involve "independent judgment" within the meaning of Section 2(11). See, e.g., Vencor

Director's Decision and Direction of Election finding that the RNs in that case are employees, not statutory supervisors. By Order dated March 6, 2000, the Board

Hosp.-Los Angeles, 328 NLRB No. 167 (slip op. at 4) (1999); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 552 (9th Cir. 1997); VIP Health Serv., Inc. v. NLRB, 164 F.3d 644, 648-649 (D.C. Cir. 1999).

To the extent that the Employer suggests that the RNs are statutory supervisors because at times they may be the highest ranking personnel on site and may be in charge of the facility, that contention lacks merit. The Board has held that the highest ranking employee on a shift is not necessarily a statutory supervisor. See, e.g., Bozeman Deaconess Hosp., 322 NLRB 1107, 1116 (1997); St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047 (1997).

The Employer also contends that the RN charge nurses' authority to transfer nursing staff between the hospital and the nursing home establish supervisory status. The RNs, however, move personnel merely to balance the existing workload among the available staff. Such a common sense adjustment involves the exercise only of routine judgment, not independent judgment. See, e.g., Providence, 320 NLRB 717, 732 (1996) ("[b]alancing work assignments among staff members . . . does not require the exercise of supervisory independent judgment"); Northern Montana Health Care Ctr., 324 NLRB 752, 754 (1997) (authority to transfer aides to remedy coverage problems not supervisory because such transfers do not involve "anything more than a routine judgment as to the number of aides needed to serve a particular number of patients"), enforced, 178 F.3d 1089 (9th Cir. 1999).

Nor is there any merit to the Employer's contention that the RNs are supervisors because, in their capacity as charge nurses, they call in staff when the need arises. As

(Chairman Truesdale and Members Fox and Liebman) denied the employer's request for review as it "raise[d] no substantial issue warranting review."

discussed above, the RN charge nurse simply examines the existing schedule to identify someone who may be available to fill in. The performance of that function does not establish the requisite level of judgment for supervisory independent judgment to exist. See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB 223, 224 (1997) (LPNs not supervisors, even though they found replacement employees, because the LPNs followed standard procedure within established guidelines); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 552-554 (9th Cir. 1997) (finding a replacement employee by "call[ing] employees in to work based on a pre-prepared staffing list . . . is more clerical than supervisory, and [does] not involve the exercise of independent judgment"). Additionally, the evidence does not show that the RNs have the authority to order staff members to come in to work. In the absence of such evidence, the Employer has not met its burden of establishing that the RNs' authority regarding calling in staff members is anything more than the nonsupervisory authority to seek out volunteers. See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB at 224; Providence Alaska Med. Ctr. v. NLRB, 121 F.3d at 553 (nurses not supervisory where they could not order an employee to come in early or work late).

The Employer is equally unconvincing in contending that RNs are supervisors, because they have the authority to send staff home for serious misconduct such as patient abuse, intoxication, or drug use. The Employer has not demonstrated that charge nurses exercise such authority frequently. In the absence of such proof, the Employer has not demonstrated that the RNs' authority to send employees home is supervisory, as the infrequent or sporadic exercise of such authority is insufficient to confer supervisory status. See, e.g., St. Francis Med. Ctr.-West, 323 NLRB 1046,

1047, 1048 (1997). Moreover, the evidence does not demonstrate that the nurses use independent judgment in deciding whether to send an employee home. Under the Employer's policies, nurses have no real choice but to take such action. Under those circumstances, the nurses are merely following and executing predetermined policy, not exercising "independent judgment" with the meaning of Section 2(11). See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB 223, 224 (1997) (LPNs who had authority to send home aides who were incapacitated by alcohol, drugs, or illness deemed not to be supervisors, as "little discretion [was] involved because LPNs are required to take such action"). Additionally, the Board typically has found that such authority does not require independent judgment where its exercise is limited to situations involving flagrant or egregious misconduct that endangers patient health or safety. See, e.g., Vencor Hosp.-Los Angeles, 328 NLRB No. 167, slip op. at 4 (1999).

Contrary to the Employer, the RNs are not supervisors based on their authority to notify the DON about problems that may require discipline. That notice function is merely reportorial, not supervisory. Such notice does not constitute supervisory disciplinary authority within the meaning of Section 2(11) of the Act because it does not have any tangible effect on employees' job status and does not necessarily result in adverse action. See, e.g., Ten Broeck Commons, 320 NLRB 806, 812 (1996); Northern Montana Health Care Ctr., 324 NLRB 752, 754 (1997), enforced, 178 F.3d 1089 (9th Cir. 1999).

Similarly without merit is the Employer's claim that the charge nurses are supervisors because they give recommendations regarding hires. Such recommendations are supervisory only if they are "effective" recommendations within

the meaning of Section 2(11). "[A]uthority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." Children's Farm Home, 324 NLRB 61, 61 (1997). The evidence does not establish that charge nurses' input in the hiring process is accepted without independent investigation by the DONs.

I also reject the Employer's contention that the RNs role in evaluating staff makes them supervisors. Section 2(11) does not list "evaluate" as one of the 12 identified supervisory functions. Accordingly, preparation of evaluations, without more, cannot confer supervisory status. See Waverly-Cedar Falls Health Care, 297 NLRB 390, 392 (1989), enforced, 933 F.2d 626 (8th Cir. 1991); Ohio Masonic Home, 295 NLRB 390, 393 (1989). The Board's policy is that a worker's role in evaluating coworkers is not supervisory unless those evaluations "lead directly to personnel actions affecting those employees, such as merit raises." Ten Broeck Commons, 320 NLRB 806, 813 (1996). Alternatively, "for evaluations to constitute evidence of supervisory status they must effectively recommend personnel action." Northcrest Nursing Home, 313 NLRB 491, 498 (1993). In this case, the RNs merely give input to the DONs as part of the DONs' evaluation process. That input does not lead directly to personnel actions such as merit raises, nor does the input constitute effective recommendations of personnel action. While the DONs consider the charge nurses' input, the record evidence establishes that the DONs make their own independent determinations about what goes in the final evaluations. Thus, the RNs' input serves primarily a nonsupervisory reporting function. The fact that LPNs and CNAs also may give input as part of the Employer's evaluation

process bolsters the conclusion that participation in the evaluation process is not supervisory.

Additionally, I conclude that the RNs' involvement in resolving some disputes among staff is not sufficient to establish that they perform a supervisory grievance-adjustment function. The nurses do not participate in any formal dispute resolution procedure, such as a grievance procedure in a collective-bargaining agreement. It appears that they have authority only to use their personal relationships with staff members to informally resolve relatively minor problems. Thus, the nurses act merely as mediators who help remedy problems through a process of mutual consent. Under those circumstances, the nurses do not adjust grievances within the meaning of Section 2(11). See, e.g., Ohio Masonic Home, 295 NLRB 390, 392-393, 394 (1989) (charge nurses' authority to rely on their personal relationships with employees to informally resolve minor complaints insufficient to establish supervisory status); Illinois Veterans Home at Anna L.P., 323 NLRB 890, 891 (1997) (same). Moreover, the Board long has distinguished between acts demonstrating supervisory authority and those undertaken by employees with the mutual consent of other employees. See, e.g., Washington Post Co., 254 NLRB 168, 205 (1981); Skaggs Drug Ctrs., 197 NLRB 1240, 1240 (1972), enforced, 84 LRRM 1505 (9th Cir. 1973); Peoria Journal Star, Inc., 117 NLRB 708, 710 (1957).

Finally, I find that the RN charge nurses' role in responding to disasters does not make them supervisors. That role is not adequate to create supervisory status because charge nurses have not had frequent occasion to invoke the Employer's disaster plan. See, e.g., St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047, 1048 (1997) (infrequent

exercise of authority insufficient to confer supervisory status). Additionally, the charge nurse merely follows predetermined policy by initiating the call tree once a disaster situation arises. The charge nurse does not exercise independent judgment in that regard. Moreover, the charge nurse's coordination of the facility's disaster response is simply an aspect of the performance of her professional duty to provide medical care. See, e.g., Providence, 320 NLRB 717, 729 (1996).

3. The Status of Particular Individuals Whom the Petitioner Seeks to Exclude

The Petitioner seeks to exclude from the unit the individuals occupying the following positions, contending that they are predominantly supervisory: the Education Coordinator, the Risk Manager, the Patient Services/Social Services Coordinator, the Nursing Administrative Assistant, the Long Term Care Coordinator, and the OR Supervisor. The Employer contends that those individuals do not perform supervisory functions. The Petitioner bears the burden of proving that those individuals are supervisors who should be excluded. See Bennett Indust., 313 NLRB 1363, 1363 (1994).

I find that the Petitioner has not met its burden of proving that the individuals holding any of those contested positions are supervisors. The Petitioner did not adduce any evidence at the hearing to demonstrate that any of those individuals perform functions that are supervisory under Section 2(11). While the job descriptions for those positions are in the record, they do not demonstrate the existence of supervisory status.

Alternatively, the Petitioner seeks to exclude those same individuals on the asserted grounds that they do not share a community of interests with the unit employees because they do not perform any substantial direct patient care. The

Employer contends that the record shows that those individuals perform enough unit work for them to be included in the unit. The Employer's position appears to be that those individuals are dual function employees who perform both unit and nonunit work. In such situations, the Board's test for determining whether the employee should be included in the unit is whether the employee performs unit work for sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. See Air Liquide America Corp., 324 NLRB 661, 662 (1997) (citing Berea Publishing Co., 140 NLRB 516, 518-519 (1963)). Dual-function employees may be included in a unit even though they spend less than a majority of their time on unit work. See Martin Enterprises, 325 NLRB 714, 715 (1998). As the party seeking to exclude individuals from the unit, the Petitioner bears the burden of proving that they should be excluded. See Benchmark Mech. Contractors, 327 NLRB No. 151, slip op. at 1 (1999).

With respect to the Education Coordinator, I find that the evidence substantiates the Petitioner's claim that the occupant of that position should be excluded. The record shows that LPN Sharon Dschaak holds the Education Coordinator position. Her duties as Education Coordinator relate to staff development, such as employee orientation and in-service training. Dschaak works occasionally as a nurse on the floor, but only very rarely. Accordingly, I conclude that the evidence demonstrates that Education Coordinator Dschaak should be excluded from the unit. See, e.g., Martin Enterprises, 325 NLRB 714, 715 (1998) (employee excluded from unit where his performance of unit work was sporadic rather than regular).

Contrary to the Petitioner, I conclude that the individuals holding the positions of Risk Manager, Patient Services/Social Services Coordinator, Nursing Administrative Assistant, Long Term Care Coordinator, and OR Supervisor should not be excluded. My reasons for that conclusion are as follows.³

The record demonstrates that RN Shirley Gabrielson holds the Risk Manager position. As Risk Manager, she plans, organizes, and directs the Employer's risk management function. She also works the recovery room in Poplar on surgery days when needed. The record does not reveal how frequently she works the recovery room. In the absence of evidence showing that she does not work regularly in the recovery room, I conclude that the Petitioner has not met its burden of proving that her exclusion from the unit is warranted.

Similarly, the Petitioner has not met its burden of showing that the Patient Services/Social Services Coordinator should not be part of the unit. LPN Barb Matthews holds that position at Poplar. In that capacity, Matthews directs, plans, and coordinates activities of patients/residents. She also spends about five hours per day as a nurse in direct floor care at Poplar. Given that the evidence shows that Matthews performs a substantial amount of unit work, the Petitioner has not demonstrated that Matthews' exclusion is warranted.

³ The record shows that at least some of the individuals holding those positions work in both Poplar and Wolf Point. For example, the Risk Manager splits her time between the two locations, and the Patient Services/Social Services Coordinator who primarily works in Poplar sometimes works in Wolf Point also. That fact, however, does not bolster the Employer's contention, discussed above, that employee interchange between the two locations requires a multi-location bargaining unit. The evidence does not establish that those individuals go back and forth between Poplar and Wolf Point to perform direct patient care work on the floor. Rather, the evidence indicates that they work at both locations primarily to perform the nonunit parts of their dual function positions.

With respect to the Nursing Administrative Assistant position, the record indicates that LPN Barb Matthews holds that position in addition to her Patient Services/Social Services Coordinator position. As stated, Matthews' exclusion is not appropriate because she works as a floor nurse for five hours per day.

The Petitioner has not presented any evidence to demonstrate that the Long Term Care Coordinator should be excluded. In Poplar, RN Jeanette Hilde occupies that position. The record is virtually silent on the extent to which Hilde works the floor, though it appears that DON Turnbaugh testified that Hilde has worked shifts as a floor nurse. Accordingly, the Petitioner has failed to satisfy its burden to exclude her.

Finally, the record shows that RN Lauri Handy is the OR Supervisor at Poplar. In that position, she plans and controls the functions in the surgical area. The record reveals that Handy also serves as an OR circulating nurse at the Poplar hospital/nursing home and as a floor nurse at the Poplar clinic. That evidence undermines the Petitioner's request that she be excluded.⁴

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Undersigned among the full-time and regular part-time registered nurses, licensed practical nurses, and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and

⁴ In its brief, the Employer indicates that there also are questions regarding whether additional individuals who occupy other positions (Ward Clerk, Circulating Nurse, Trauma Nurse Educator, Central Supply Clerk, Physical Therapy Aid, Home Health Care Coordinator, and CNA/Housekeeper) should or should not be included in the unit. The Petitioner does not seek to exclude those individuals. It appears that the Employer seeks to have them included. Given that no party seeks to exclude those other individuals, I do not address their unit status herein.

supervisors as defined in the National Labor Relations Act, at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those full-time and regular part-time registered nurses, licensed practical nurses, and certified nursing assistants who are employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period, and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The voting in this matter shall be conducted in two voting groups; Voting Group A for professional employees and Voting Group B for nonprofessional employees. The appropriate unit descriptions for the voting groups shall read as follows:

⁵ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

Voting Group A: All full-time and regular part-time registered nurses employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act.

Voting Group B: All full-time and regular part-time licensed practical nurses and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act.

The employees in Voting Group A will be asked the following two questions on their ballot:

1. Do you desire to be included in the same unit as full-time and regular part-time licensed practical nurses and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana?
2. Do you desire to be represented for purposes of collective bargaining by AFSCME Montana State Council #9, AFL-CIO?

If a majority of the Voting Group A employees vote "yes" to the first question, indicating a desire to be included in a unit with nonprofessional employees, they shall be so included. Their vote on the second question will then be counted with the votes of the nonprofessional employees in Voting Group B to decide whether to select the Petitioner as the representative for the entire combined voting unit. In that event, the combined appropriate unit shall read as follows:

All full-time and regular part-time registered nurses, licensed practical nurses, and certified nursing assistants employed by the Employer at its hospital, nursing home, and clinic in Poplar, Montana, excluding family nurse practitioners, guards, all other employees, and supervisors as defined in the National Labor Relations Act.

If a majority of the Voting Group A employees vote "no" to the first question, indicating a desire to not be included in a unit with nonprofessional employees, their ballots will be separately counted to determine whether or not they wish to be represented by Petitioner.

The employees in Voting Group B will be asked only a single question; the same question as Question 2 for Voting Group A.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before August 10, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by August 27, 2000. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 3rd day of August, 2000.

Daniel C. Ferguson, Acting Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433

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